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No. 83-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUN MYUNG MOON AND TAKERU KAMIYAMA, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., THE PRESBYTERIAN CHURCH (U.S.A.), THE AMERICAN BAPTIST CHURCHES IN THE U.S.A., THE AFRICAN METHODIST EPISCOPAL CHURCH, THE NATIONAL ASSOCIATION OF EVANGELICALS, AND THE CHRISTIAN LEGAL SOCIETY AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Did the court below err when it permitted the government to penalize a religious organization for its choice of organizational structure or form when:

   (a) that structure developed in response to theological determinations and beliefs, and

   (b) members of that organization were aware of and accepted that structure as a part of their sincerely held religious beliefs?

2. Did the court below err in allowing a jury:

   (a) to impose its notion about the ownership of funds of a religious organization when its notion runs contrary to the religious beliefs and practices of the ministers of and donors to that religious organization, or

   (b) to decide when funds of a religious organization have been properly spent for "religious" purposes or for the carrying out of the religious mission of the organization?

3. Did the court below err in concluding that, when someone's religious beliefs and practices are relevant to his defense to charges against him in proceedings before governmental authorities, those beliefs and practices may be disregarded in assessing that person's challenged conduct?

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Pursuant to Rule 36.1 of the Rules of this Court, the organizations named above file this brief in support of the instant petition for certiorari. Consent for filing of this brief has been obtained in writing from the attorneys of record for the parties in this case. Their original letters have been filed with the Clerk of this Court.

INTEREST OF AMICI

1. The National Council of the Churches of Christ in the U.S.A. is the cooperative agency of 32 national Protestant and Eastern Orthodox religious bodies in the U.S., having an aggregate membership of over 40,000,000. This brief does not purport to represent the views of all of those persons, but is based on policy determined by their representatives sitting as the Governing Board of the National Council of Churches, a deliberative body of about 250 persons, chosen by the member denominations in proportion to their size and support of the Council. The policy which underlies this action was expressed by the Board in 1955: "The National Council of Churches defends the rights and liberties

of cultural, racial and religious minorities." *Policy Statement: Religious and Civil Liberties in the U.S.A.* Three of the national denominations which are members of the National Council of Churches have been particularly concerned about this case and, from their own respective policy bases, have joined this brief as *amici* in their own right in addition to being represented by the Council.

2. The Presbyterian Church (U.S.A.) is a national, Christian denomination with churches in all 50 States. It has approximately 3,150,000 active members and approximately 11,750 congregations organized into 195 Presbyteries and 20 Synods. The General Assembly is the highest governing body of the Church, meets annually, and is composed of approximately 600 delegates elected by the Presbyteries, known as commissioners, one-half of whom are ordained ministers, the other half ordained lay officers known as ruling elders. This brief does not purport to reflect the views of all members of the Church, but is based upon policies decided by the General Assembly or incorporated into the Constitution of the Church by vote of the Presbyteries. Chapter I of the Form of Government, a part of the Church's present Constitution, was first published in 1788 by an antecedent body, the Synod of New York and Philadelphia, where the founders of the Presbyterian Church asserted (and the Church still affirms in its basic documents) that "they consider the rights of private judgment, in all matters that respect religion, as universal and inalienable: they do not even wish to see any religious constitution aided by the civil power, further than may be necessary for protection and security, and, at the same time, be equal and common to all others." Consistent with this "principle of common rights," they recognize that every church is entitled to declare "the whole system of its internal government."

3. The American Baptist Churches in the U.S.A. is a national Baptist denomination of some 6,000 congregations with some 1.5 million members, with national offices in Valley Forge, Pennsylvania. The American Baptist Churches in the U.S.A. has a mandate from its General Board to speak whenever Baptist principles are involved. The pres-

ervation of religious liberty is a tenet of the Baptist religious belief. The issues present in this case are basic to the Baptist principles of religious liberty and separation of church and state.

4. The African Methodist Episcopal ("AME") Church was founded in Philadelphia in 1787. It arose because of the racial discrimination within the existing Methodist Episcopal Church. Today, the AME Church includes 6,000 churches with 2,050,000 members operating 5,500 Sunday or Sabbath schools with enrollments of 156,000. The Church includes 6,170 ordained clergy with 18 Bishops for 18 Districts, plus a Bishop in charge of Ecumenical Relations and AME Chaplaincy Relations, in addition to six retired Bishops in the AME Church. The Church joins the instant brief out of deep concern for the issues of religious freedom involved—issues which seem especially compelling when, as here, the defendants on trial are men of color.

5. The National Association of Evangelicals, located in Wheaton, Illinois, is a nonprofit association of evangelical Christian organizations, colleges and universities, as well as some 36,000 churches from 74 denominations. It serves a constituency of 10 to 15 million people through its commissions and affiliates. These affiliates include the National Religious Broadcasters, the World Relief Corporation, and the Evangelical Foreign Missions Association. The Association has participated in many religious liberty cases as *amicus curiae*.

6. The Christian Legal Society is a non-profit Illinois Corporation founded in 1961 as a professional association of Christian attorneys, judges, law professors, and law students. Today it includes over 3,500 members throughout the United States. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect and promote the freedom of Christians and others to exercise their religious beliefs. Since its founding, the Center for Law and Religious Freedom has filed *amicus curiae* briefs in cases where religious liberty issues are at stake.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in the petition for certiorari, insofar as the facts set forth therein are relevant to the arguments below.[1] We accept for purposes of this brief the conclusion of the New York Court of Appeals and the United States District Court for the District of Columbia that the Unification Church is a religious organization entitled to the protection of the First Amendment, a characterization not disputed in the court below. *See, Holy Spirit Association* v. *Tax Commission*, 55 N.Y. 2d 512, 528 (1982); *Unification Church* v. *INS*, 547 F. Supp. 623, 628 (D.D.C. 1982). The Second Circuit itself acknowledged that the Unification movement's traditions are akin to those of "centuries-old" religious orders. 718 F.2d at 1233 n.7.[2]

We stress that our filing of this brief is motivated not by any particular sympathy for Reverend Moon, or by any agreement with his faith. Those of us who are members of the National Council of the Churches of Christ accept the finding of its Faith and Order Commission that the doctrine of the Unification Church is not consistent with that of traditional Christian theology as believed through twenty centuries. All of us are motivated, nevertheless, by deep alarm at the means by which defendant Moon's conviction below was secured, the basis upon which it was upheld by the Circuit Court, and the consequences for religious liberty should the decision below be allowed to stand.

SUMMARY OF ARGUMENT

No claim is made here that religious officials or indeed entire churches enjoy absolute immunity from the law sim-

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[1] We urge that this Court review the Second Circuit's affirmance of both Reverend Moon's and Takeru Kamiyama's convictions inasmuch as the convictions of both petitioners were secured and upheld on a basis that violates fundamental precepts of religious liberty and due process.

[2] See also *Ward* v. *Connor*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 1253 (1982); *Troyer* v. *Town of Babylon*, 483 F.Supp. 1135, 1137 (E.D.N.Y.), *aff'd*, 628 F.2d 1346 (2d Cir.), *aff'd mem.*, 449 U.S. 988 (1980).

ply by virtue of their religious status; many legal principles apply in the same way to church officials as they do to others. Nothing in the First Amendment, properly construed, sets any religion or religious leader "above the law." We do not accept the view that any act or practice of a religious body or its officials is *ipso facto* "religious" and therefore automatically beyond scrutiny by civil authorities.

We support review, instead, because we firmly believe that, when a defendant's religious belief and practices become *relevant* to refuting the charges against him, treating him *as though* religion had nothing to do with the matter is the very essence of unfairness and discrimination. Equally intolerable, we submit, is the exploitation of religious *prejudice* to secure a defendant's conviction. Either to disregard religion when it is relevant to that person's defense, or to use antipathy toward a defendant's religion as a means of establishing his "guilt," violates the Religion Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment.

We submit that the decision below affirmatively upholds, or effectively places beyond redress, a grave subversion of religious liberty and due process—one that is cause for deep alarm and manifestly warrants this Court's review. For as the court below chillingly prophesied, Reverend Moon's case "plainly . . . will not be the last" of its type, 718 F.2d at 1230; the principles upon which the Second Circuit sustained his conviction are principles of potentially unlimited reach, applicable in *any* criminal *or* civil proceeding in which the acts or practices of a religious body or its leaders are drawn into question. On the narrower issue of church property use and ownership, we believe that the judgment below represents a uniquely grave threat to church autonomy; the recognition of this threat, indeed, forms the basis of Judge Oakes's powerful dissent from the decision below. For these and the other reasons stated below, *amici* urge that the instant petition be granted and the far-reaching questions presented by the decision below resolved.

REASONS FOR GRANTING THE WRIT

The decision below established a number of precedents which *amici* believe seriously threaten religious liberty protected by the First Amendment. We urge this Court to review that decision for the reasons which follow.

I.

THE DECISION BELOW STANDS FOR THE PROPOSITION THAT JUDGES AND JURIES MAY OVERRIDE A RELIGIOUS ORGANIZATION'S DECISIONS ON ITS OWN ORGANIZATION, HOW IT WILL ALLOCATE RESPONSIBILITY OVER CHURCH MATTERS, AND HOW IT WILL SPEND ITS RELIGIOUS RESOURCES.

An assertion such as this requires detailed substantiation. The following is offered at this time in support:

A. The decision below affirms the government's authority to disregard and override a church's own views on issues of organization, responsibility, and resources.

To prove its position that the assets held in Reverend Moon's name belonged to him personally rather than to his international religious movement, the government relied heavily on two premises: (1) that this international religious movement did not really exist because it had no formal corporate status; and (2) that the assets held by Reverend Moon were his own because they were treated in ways that the jury could consider, on any basis it wished, not to be "religious."

1. Choice of structure

In order to discredit Reverend Moon's claim that he held the assets at issue in trust for his international religious movement, the government tried to show that the movement *did not exist* by pointing to the fact that Reverend Moon and his followers "avoid[ed] the structures that exist in the United States where . . . funds [contributed to a religious entity] should rightly go." That Reverend Moon's international religious movement had no "corporate structure" during the period in question was, indeed, the central element of the government's contention that Reverend Moon was lying when he claimed to hold the money in trust

for the movement. Moreover, the government took the position that the international movement's unincorporated status was especially suspicious in light of the fact that some movement entities here and abroad were in fact incorporated. However, it is logical to assume that an international movement might not want to be limited by the strictures which would be placed on it by incorporating in one country.

Only if it is assumed that a religion must incorporate *all* of its entities or *none* of them in order to prove its legitimacy may a religion's choice to incorporate only *some* of its entities support any adverse inference as to its bona fides.

The trial court *instructed* the jury to take this religious movement's organizational characteristics into account in determining whether the assets in question belonged to it or to the defendant, lecturing defense counsel that "the nonexistence of [some organizational characteristics] would be proof the other way"—*i.e.*, proof that the religious movement did not exist.

The court below upheld the offending instruction. In the name of eschewing "word-by-word parsing of a jury charge," 718 F.2d at 1225 [citing *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973)], the circuit court sustained the trial court's instruction that the Unification movement's corporate structure could be taken into account in determining whether or not a trust had been created.

2. **Choice of Expenditures**

The government itself conceded that the sources of the funds in question were "evangelical activities, fund raising, things like that." And the trial court recognized during the argument on Reverend Moon's mid-trial motion for a judgment of acquittal that the assets he held had been given to him "for a higher cause," by church members who "thought they were advancing [their common religious movement] internationally." As Judge Oakes in his dissent noted, "the assets in question came to Moon largely from members of his faith, and there was some evidence that the donors intended their contributions for religious purposes." 718 F.2d at 1242. Ordinarily these facts would be enough to establish

that the donors had intended to create a religious trust in turning over to Reverend Moon monies they had raised.[3]

But the government here was permitted to deny the existence of such a trust by relying heavily on how Reverend Moon used the assets he had received from his followers. Simply, the government argued that Reverend Moon's use of the monies in question "for . . . business ventures primarily and real estate investments" was itself *proof* that no religious trust existed—despite the fact that churches routinely and necessarily invest their funds in "business ventures" as part of the effort to sustain and spread their spiritual mission.[4]

No relief from such prejudicial and profoundly misguided argument was afforded by the trial court. Thus, the trial court, in a misstatement of trust law, *directed* the jury to find that the funds at issue all belonged to Reverend Moon personally—rather than to the international church—if the jury concluded that he was free to use any part of the funds as "personal" compensation, or if the jury concluded that any of the ways in which he expended or invested the funds did not serve what the jury, applying its own standards, deemed to be "church purposes." As noted above, the circuit court accepted the jury's conclusion in this regard.

B. In affirming such governmental authority over a church's choices of structure and spending practices, the decision below threatens religious freedom and church autonomy.

Religious liberty encompasses not only the freedom to believe in and worship one's God in solitude and peace,

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[3] Inexplicably, the circuit court decided that the evidence established nothing more than that "a charitable *gift* had been made to the *church*." 718 F.2d at 1225. This is inexplicable both because of the trial court's recognition that the funds had been given "for a higher cause" (implying a trust) and because the circuit court's assessment of the evidence, even if correct, is itself inconsistent with the conclusion that the funds were given to Reverend Moon *personally*.

[4] For example, the Presbyterian Church (U.S.A.) has invested more than $357.9 million in securities of more than 175 corporations, and the four National Boards of the American Baptist Churches in the U.S.A. have combined investments of some $370 million in securities of more than 100 corporations.

but also the power of those of shared faith "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976) (state cannot reorganize church even for supposedly violating its own by-laws). Solicitude for a religious movement's choice of structure is especially warranted where the movement is still in its infancy, and its structure and practices therefore somewhat fluid.

Yet the government asked the jury to draw adverse inferences from this international religious movement's failure to incorporate itself, and from the particular mix of structures chosen by this religious movement for its subordinate national or other entities. For a jury to be allowed to draw adverse inferences from any religious movement's choice of structure obviously penalizes that choice in violation of the Free Exercise Clause.[5]

Similarly, the Constitution forbids the government to defeat a religious trust, or otherwise to transform church assets into personal assets, by characterizing the uses to which parts of such assets are put as "business" or "personal" rather than "religious." There is no doubt, after all, that most churches feel that they must make "business" investments and that they must pay many of their religious officials' "personal" living expenses—all as part of their use of church assets to support the religion's spiritual activities.

At stake is who shall decide which such investments and payments advance a given religion's aims, and which do not. The First Amendment tolerates only one answer to this question: *Each church must decide for itself.* It is surely impermissible under the First Amendment for the gov-

[5] It should not be forgotten that some noted long-established religious bodies in this country have never been incorporated, and probably never will be. The Episcopal Church in the United States is not incorporated as such; all of its national property is held for it by a corporation known as "The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the U.S.A." Nor is the United Methodist Church incorporated as such in the United States; but its major agencies, such as the General Council on Finance and Administration, are continuing and corporate bodies.

ernment, including any civil or criminal court or jury, "to determine which expenditures are religious and which are secular." *Lemon* v. *Kurtzman*, 403 U.S. 602, 621-22 (1971). *Cf. Widmar* v. *Vincent*, 102 S.Ct. 269, 274 n.6 (1981). The principle asserted by the government to obtain the result in this case, first sanctioned by the trial court and then ratified by the court below, would interpose the supervision and control of civil authorities over spending decisions by church leaders—despite the settled precept that "allocation and expenditure of [church] funds is intimately bound up in [the church's religious] mission . . . and thus is protected by the free exercise clause." *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1979).

Allowing the conviction in this case to stand would thus create a precedent even more susceptible of abuse than *Jones* v. *Wolf*, 443 U.S. 595 (1979).[6] For the trial court's approach, aproved by the Second Circuit, in effect overrode the intention of the donors in violation of *Wolf*, 443 U.S. at 603-04, and alienated assets the church faithful had entrusted to Reverend Moon for religious purposes, awarding the corpus of such assets to Reverend Moon and his heirs *as their personal property*—a gift he undoubtedly found most unwelcome in his capacity as leader of his flock. Such an alienation of assets given in trust could readily befall any religious body if the approach of this trial court, approved on appeal, should escape this Court's review. The upshot is a forbidden taking and governmental redistribution of religious property in contravention not only of the First Amendment but of the Fifth Amendment as well. *See*, *Terrett* v. *Taylor*, 13 U.S. 43 (1815). *Cf. United States* v. *564.54 Acres of Land*, 441 U.S. 506, 515-16 (1979).

[6] See Dallin H. Oaks, "Trust Doctrines in Church Controversies," 1981 B.Y.U.L. Rev. 805, 907 (criticizing Jones for "secularization of the resolution of church property disputes," and for applying a neutral principles approach that may mean "inhibiting the freedom of hierarchical churches to govern their internal affairs").

II.

THE DECISION BELOW STANDS FOR THE PROPOSITION THAT JURIES MAY DISREGARD THE RELIGIOUS REASONS FOR, AND THE RELIGIOUS MEANING OF, A DEFENDANT'S CONDUCT HOWEVER RELEVANT TO THE DETERMINATION OF INNOCENCE OR GUILT.

In stating that "defendants are only entitled to 'a fair trial but not a perfect one,'" 718 F.2d at 1216 [quoting *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953)], the Second Circuit rejected Reverend Moon's contention that the trial court had impermissibly hampered his ability to establish the religious significance of the various acts and practices for which the government sought to condemn him. The court below thus countenanced an extraordinary breach of the protections guaranteed by the First Amendment.

A. The government denied critical religious explanations of this religious leader's actions and relationships.

Because the Second Circuit's opinion manages to ignore so many of the aspects of Reverend Moon's trial that cause us such serious concern, a brief review of certain aspects of the trial record is appropriate.

1. The Government's Approach

At trial, the government's argument in chief was that certain assets placed in Reverend Moon's hands by his followers and held by him in his own name were *personal* assets, the receipt of which or the interest on which Reverend Moon should have reported as personal income. The focal point of Reverend Moon's trial, therefore, was the question of what was *meant* by the entrusting of assets to him by followers of his faith and by the holding and investment of such assets in his name. The government sought to prove Reverend Moon's personal ownership of those assets substantially on the basis of the *uses* to which they were put, arguing that he used them "for business for the economics of his empire." Accordingly, the government repeatedly urged the jury to accept *its* label of each investment made with the assets entrusted to Reverend Moon as

being a "strictly business deal." The defense sought to argue that, given Reverend Moon's special role within his religion, the meaning of his control and use of those assets was that they belonged to the church as a whole, and were merely held *for* it by Reverend Moon as the church's embodiment. There was no dispute at trial, or in the court below, over the defendant's central place within the Unification Church.

The government's strategy was to proceed against the defendant "as if . . . [he had been] an ordinary high-ranking businessman." Reverend Moon was stymied in two respects—each of which is discussed below—in his effort to show that, with respect to the use of the assets in question, he could *not* be treated simply as a businessman, without regard for either his role in his church or his religion's commitment to establishing a firm financial base for itself through religious investments in commercial enterprises.

2. **Evidentiary Rulings**

On key occasions the defense was prevented from placing before the jury explanations that would have translated Reverend Moon's position in his religion into a convincing account for the jury of *why* various supposedly "business investments" indeed had to be viewed as investments of the Church, by the Church, and for the Church—albeit in the name of Reverend Moon as the Church's embodiment.

The practice of making religious contributions directly to a religious leader for his discretionary use did not originate with nor is it uniquely related to the defendant in this case. In England as well as in this country religious contributions have been solicited by and made to religious leaders in their own name. That is the clearest and most direct way in which an adherent can make a gift to the movement.

The developmental stage of Methodism is illustrative. John Wesley, in his *Journal* of May 9, 1739 discussed the building of a meeting house. He noted that the contributors insisted that the funds go directly to him rather than to the trustees, or "feoffees," on the grounds that "such feoffees always would have it in their power to control [him]; and if [he] preached not as they liked, to turn [him] out of the

room [he] had built." The significance of this entry is that religious leaders, particularly in relatively new movements, must exercise a high degree of control over the movement and its assets lest the movement be subverted or destroyed. That many present day religious leaders have substantial funds which belong to their church and which may be used at the discretion of those leaders is a truism which has been rather fully documented.

Also, defense counsel was prevented from eliciting from a church witness on cross-examination testimony "that the purpose [of various commercial enterprises with which Reverend Moon was involved] is to allow the church to develop a financial base so that it can be self-supporting and go on and do [its] work." The defense was also prevented from asking a knowledgeable government witness to testify as to Reverend Moon's stated views with respect to the "relationship between church and business," and was prevented from eliciting testimony from other witnesses that would establish their belief—or Reverend Moon's—that investments made with the funds held by him in his own name were for religious purposes.[7]

Corporate executives are not denied the opportunity to explain the *business* meaning of their activities, signatures, or statements. Here, religious explanations of the uses to which Reverend Moon put the assets entrusted to him were undoubtedly critical to convincing the jury that the assets in fact belonged not to the defendant but rather to the movement. Yet Reverend Moon was refused the opportunity to offer such explanations, prevented from doing so in key instances both by the trial court's evidentiary rulings and by prosecution threats that introduction of such explanations would be met with disclosures by the government to the jurors of all manner of supposedly "negative things about the church."[8]

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[7] Such testimony was hindered even though the defendant's "state of mind concerning ... religious matters," as the trial court acknowledged, "may explain why certain things were done or not done."

[8] It was the fact that the defendant was forced to be tried before a jury he suspected of bias that rendered potent the prosecution's threats—and the trial court's warnings—that questions by the defense

Amici respectfully submit that denying to religious officials the same opportunity that would be afforded to business executives in like circumstances not only reduces religion from the high status assigned it by the First Amendment, but also assigns it a rank distinctly *lower* than that of its secular counterparts. Religion is *sui generis* and, under the First Amendment, must not be treated as a business is treated. *No* religion is safe when *any* religious group may be so dismissively treated. The Second Circuit's conclusion that the evidence was sufficient to support a conviction, resting as it did on the premise that Reverend Moon was not entitled to establish his version of that evidence's religious significance, and hence his innocence, is a serious rejection of settled norms of even-handed treatment of religion.

3. **Jury Instructions**

The fact that religion was inescapably involved in Reverend Moon's tax trial is clear both from the nature of the charges and from the trial court's own comments. Thus, the trial judge recognized that he had to

> get before the jury the notion that if the jury believes that the people who gave the money intended it to be for the International Unification Church Movement, and if Moon believed he was holding it for that purpose, and if he believed he was using [it] for that purpose, even though he may have in a few instances made bad investments or used some of it for himself, ... the monies could still be viewed as not being his but being the Movement's.

As Judge Oakes put it in his dissent from the decision below, "it was essential that the court's instructions precisely state the law on the creation of a trust relationship and the implications of the jury's finding that such a relationship existed in this case." 718 F.2d at 1242.

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as to religious motive would "open the door" to the introduction of damaging evidence by the government. As the court itself recognized, a defense based on expounding such matters "would have been disastrous to try before a jury."

Nevertheless, the trial court *refused* Reverend Moon's request to instruct the jury that, in determining whether the assets held in Reverend Moon's own name were those of the religious movement, simply being held for it by him, the jury should take into account Reverend Moon's ample evidence that the assets in fact "came from ... church sources"; that they were given with *intent* that they be used "for ... church purposes"; and that they were not "primarily" used for *personal* purposes. In refusing to instruct the jury to take such uncontradicted evidence into account, the court failed to apply the settled *presumption* that a religious trust exists in such circumstances.[9]

The trial court also refused Reverend Moon's request to instruct the jury that, according to the Unification Church's theology, he is the embodiment of the faith—an instruction that was also amply supported by the only evidence on the point—even though, as Judge Oakes observed in dissent, the issue of beneficial ownership that lay at the heart of the case was critically affected by the fact that Reverend Moon "was the spiritual leader of the church." 718 F.2d at 1242. For not only was there no dispute at trial over Reverend Moon's central place within his religion; in fact, the identification of Reverend Moon with his religion was acknowledged even by nonchurch witnesses called by the government, and the government in fact *relied* on Reverend Moon's role as founder and prophet of his religious movement to *discredit* him and church witnesses generally. The trial court itself recognized that, even "[l]ooking at the evidence from a favorable standpoint to the government[,] ... [the defendant] conceived ... himself, the embodiment of the International Church."

Reverend Moon's requested instruction as to his place within his religion was obviously crucial if the jurors were to understand his explanation of why he signed certain documents in his own name, why others of his faith referred to the assets as "his," and why intra-church loans involving

[9] Judge Oakes in his dissent lucidly explained why the trial court's trust instructions were nevertheless fatally defective on this, "the crucial issue in the case." 718 F.2d at 1245.

funds held in his name were often described as loans to or from him. But the trial court summarily dismissed his request for such an instruction, commenting that treating Reverend Moon as the embodiment of the faith would render him "a walking unincorporated association." But Reverend Moon was not asking for an instruction that would have placed him above the law, as the trial court seemed to imply, but only for an instruction that would enable the jury to understand what it signified for him to hold and use assets entrusted to him by others of his faith.

As a result of the trial court's failure to give such critical instructions, the government was allowed to rely precisely upon certain evidence that the assets held by Reverend Moon had been collected through religious donations and fund raising, thereby painting a highly prejudicial picture of the defendant as running, in the court's words, a "Fagin-like operation" with "hundreds of people collecting money and turning it over to him." As defense counsel observed, such an approach violates the First Amendment because "it ignores the existence of the church. It ignores the fact [of] the church's right to treat Reverend Moon as they choose to treat him." Surely the right of the church's members to treat Reverend Moon as trustee of assets they have placed in his control for religious purposes cannot be denied.

The court below, like the trial court, proved entirely inhospitable to Reverend Moon's claim that he be allowed jury instructions on the religious *meaning* of the acts and practices upon which the government proposed to secure his conviction. Not only did the Second Circuit refuse to concede the *need* for an instruction on the trust issue, denying that any evidence had been introduced of an intent on the part of Reverend Moon's followers to place their funds with him in trust, 718 F.2d at 1225, but also it specifically affirmed the trial court's refusal to instruct the jury as to the place Reverend Moon occupies in Unification religion. Because, in the Second Circuit's view, the funds at issue had been "held individually and used personally," *id.* at 1228, it was unnecessary, the court below concluded, to require the jury to consider Reverend Moon's religious status, *id.* at 1227-28. This obviously put the cart before the

horse, for Reverend Moon's status is highly relevant to *whether* the funds were "held individually and used personally."[10]

Given (1) the resistance with which Reverend Moon was met in seeking to explain the religious purposes for which the assets were used, and (2) the trial court's refusal to instruct the jury, as requested, on the significance of the source of the assets and the intent with which they were donated, Reverend Moon was put in a "no win" situation. He was portrayed as having huge sums of money and other property placed at his disposal by zealous followers, and then spending those sums as just a "businessman," engaged in "strictly personal" business deals. Thus the government was able to draw from the jury a negative answer to the question regarded by the court as central to the case—that is, "the question of whether [the defendant] can *simultaneously* be a business and a religion."

A refusal to instruct the jury on such relevant matters as Reverend Moon's role as leader of this religious movement and the objectives of the religious movement's economic activities and fund raising, in a case involving alleged financial misconduct by the religion or by its leader, constitutes a refusal to expose the jury to *the relevant religious view of what was actually going on in the case, and what the underlying facts signified.* If the Second Circuit's affirmance of the district court's rulings in this respect is allowed to stand as a precedent in other prosecutions, much tax-exempt activity by even the most traditional religious groups may well become taxable, and much innocent behavior by religious groups today could be made to appear suspect or even criminal tomorrow.

[10] In an injurious aside, the Second Circuit dismissed as "inapposite" the New York Court of Appeals' conclusion that the Unification movement is a *bona fide* religion on the ground that the principles announced there "do not serve as precedent in a federal tax prosecution." 718 F.2d at 1227.

B. The government's approach, as approved by the Circuit Court, would destroy many of the protections guaranteed by the free exercise clause of the First Amendment.

As we have argued, it is settled principle of this nation's legal heritage that only an illusory and inadequate even-handedness is achieved when the law, in a supposed exercise of "neutrality," chooses to disregard religious explanations for an individual's or group's actions—for example, a couple's decision as to the education of their children, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), or an individual's explanations for his decisions as to employment, *Thomas* v. *Review Board*, 450 U.S. 707, 714-19 (1981); *Sherbert* v. Verner, 374 U.S. 398 (1963). *Cf. Welsh* v. *United States*, 398 U.S. 333, 338-39 (1970); *United States* v. *Seeger*, 380 U.S. 163 (1975). If the decision below were allowed to stand, the law would take a major step backward from this tradition of respect for religion and the religious.

Moreover, as is clear from a review of the cases cited above, the principle that religious notions and explanations must be least be fully taken into account when offered by a defendant to explain or justify his actions is critical to followers of *all* faiths, not simply those faiths that are new or small or in disfavor; and the principle is applicable not simply in criminal contexts but in civil contexts as well. From the tax-exempt status of a church parking lot, to the validity of an unincorporated church association's assertion of power to direct the actions of a church corporation, little of what even modern-day *mainstream* churches routinely do would survive intact if squeezed through a religion-extracting filter. The decision below applies such a filter in flat disregard of the First Amendment.

III.

A RULE OF "DEFERENCE" TO A DISTRICT COURT'S DISCRETION CANNOT STAND IF IT PERMITS GRAVE BREACHES OF FIRST AMENDMENT PRINCIPLES.

In denying defendant's post-trial motions for relief, the trial court said it had "played the case" as though "the the-

ology of the church had nothing to do with the tax charges." The violation of fundamental principles of religious freedom would have been severe even if the court's only error had been to permit the government to try this religious leader, as the government put it, "just as [it would have tried] any high ranking business executive." But the violation of First Amendment rights here was rendered even more egregious by the trial court's rulings allowing the government to use Reverend Moon's religion *against* him, while forbidding Reverend Moon at critical junctures to use his religion in his defense.

In the name of appellate restraint, the court of appeals for all practical purposes has held beyond review the grave breaches of First Amendment principles permitted by the trial court in allowing such "evidence." As worrisome as we find the abuses the circuit court affirmatively upheld, we also find deeply disquieting the lesson of the decision below that many of the abuses tolerated by the trial court may simply be without hope of redress. This stark abdication of the judicial function is an ominous portent for all religious groups, plainly presenting questions worthy of this Court's review.

CONCLUSION

Our alarm at the injustice in this case arises from the complete disregard of Reverend Moon's First and Fifth Amendment Rights, first by the trial court and then, on appeal, by the court below. No particular sympathy for the defendant in this case, and no agreement with his faith, is required to feel grave distress at the resulting breach of religious liberty. The government's use below of Reverend Moon's religion—exploiting its unpopularity, and precluding him at key junctures from asserting defenses based on the practices and teachings of his religion—severely threatens rights of all religious groups. Accordingly, for this and for all of the foregoing reasons, we urge this Court to grant the petition for certiorari, and decide the important questions presented by this case.

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